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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 NORTH AMERICAN COMPANY FOR  
LIFE AND HEALTH INSURANCE,

12 Plaintiff,

13 vs.

14 MICHAEL L. PHILPOT, an individual,  
15 VIRGINIA B. HIRSH, an individual,  
JOHN B. KUYKENDALL, an individual,  
16 RENE ALEJANDRO LACAPE, an  
individual, C. RICHIE MCNAMEE, an  
17 individual and HECTOR PAEZ VALDEZ,  
an individual,

18 Defendants.  
19

**Case No.: 08 CV 0270 BEN NLS**

**SUPPLEMENTAL REPLY OF RENE  
LACAPE IN SUPPORT OF DEFENDANT  
HIRSCH AND LACAPE'S MOTION TO  
DISMISS PURSUANT TO FRCP 12(b)(6)**

Date: May 5, 2008  
Time: 10:30 a.m.  
Courtroom: 3

20  
21 Defendant RENE ALEJANDRO LACAPE ("Lacape") hereby submits the following  
22 supplemental reply brief in support of defendants' Motion to Dismiss Pursuant to FRCP 12(b)(6).

23 Plaintiff's complaint is overreaching in its claims and is devoid of substance. In an effort  
24 to hide the defects in its complaint, plaintiff uses inflammatory words such as "illegal", "scheme"  
25 and "sham" to describe the conduct of the defendants and the insureds, despite the fact that the  
26 actions of the defendants as set forth in the complaint were legal and despite plaintiff's  
27 acknowledgment in its opposition to this motion that the life insurance policies it issued were  
28 (and are) valid.

## I. DISCUSSION

The essential allegation of the complaint, which forms the basis for a majority of plaintiff's claims, is that defendants used the "Illegal Commission Scheme" to induce "complicit applicants" to purchase life insurance from plaintiff and that said policies were not maintained as "designed or as was required" by plaintiff. (Complaint page 23, lines 8-15). However, plaintiff's claims fail for several reasons. First, the conduct complained of (specifically, the rebating of life insurance premiums) is legal in the State of California. Second, the plaintiff is the arbiter of the very system of which it now complains. Because of the competitive nature of the insurance business, the plaintiff created a system in which it is possible for life insurance agents to be paid commissions in excess of the premiums paid during the initial years on the life insurance policies sold by them. Plaintiff's assertions that it is somehow the victim of the commission system that it created, and which it continues to sponsor, are disingenuous.

Despite plaintiff's provocative characterization of defendants' actions, there is no factual basis to support any of plaintiff's causes of action. Particularly devoid of any merit are plaintiff's causes of action for violation of California Business and Professions Code § 17200 and 18 U.S.C. § 1962(c) – Civil RICO.

### A. Rebating is Legal in California

Despite plaintiff's best efforts to confuse this issue and shift the Court's focus, the simple fact is that the rebating of life insurance premiums is legal in the State of California.

Proposition 103 was a sweeping referendum that dramatically altered insurance regulation in California. While much of Proposition 103 addressed concerns regarding sky-rocketing automobile insurance premiums, it also expressly repealed certain sections of the California Insurance Code in their entirety; in particular, the "anti-rebating" provisions contained in former Insurance Code section 750, et seq. See Harvey Rosenfeld, *Auto Insurance: Crisis and Reform*, 29 U. Mem. L. Rev. 69, 107 (1998); *California Insurance Law & Practice*, Vol. 3, Matthew Bender, 2007, § 21.02[4], p. 21-7.

In addition, plaintiff's assertion that Proposition 103 does not apply to life insurance is simply incorrect. It is true that many of amendments to the Insurance Code made by Proposition

1 103 do not apply to life insurance (i.e., rate roll-backs, review and approval of rates, etc.), as  
 2 stated in by Insurance Code §§ 1861.13 and 1851. However, as discussed above, Proposition 103  
 3 also repealed certain Insurance Code sections in their entirety. The repeal of the anti-rebating  
 4 provisions contained in former Insurance Code § 750, et seq., applied to all types of insurance  
 5 covered by that section, including life insurance.

6 Accordingly, rebating life insurance premiums is legal in the State of California.

7 **B. The Plaintiff Received Exactly What It Bargained For When It Issued The Policies.**

8 As described above, plaintiff resorts to using inflammatory words such as “illegal”,  
 9 “scheme” and “sham” to describe the alleged conduct of the defendants and the insureds, despite  
 10 the fact that the actions of the defendants were legal and despite plaintiff’s acknowledgment that  
 11 the subject life insurance policies that it issued are valid. (Opposition to Motion to Dismiss, page  
 12 9, lines 3-5).

13 Plaintiff’s complaint alleges that the policies at issue were not maintained as “designed or  
 14 as was required” by plaintiff. (Complaint page 23, lines 11-12). Defendant Lacape is not aware  
 15 that plaintiff “required” any of the life insurance policies at issue to be maintained for a specified  
 16 period of time. Plaintiff’s business model is apparently one in which it knowingly and willingly  
 17 enters into insurance policies in which it incurs economic losses in the first few years that a  
 18 policy is on the books. Far from engaging in an “Illegal Commission Scheme”, defendants  
 19 simply provided plaintiff with that which it desired: namely ready, willing and able insureds. The  
 20 defendants cannot be faulted if the plaintiff’s earnings with respect to certain policies were less  
 21 than anticipated due, in part, to a commission structure that plaintiff created.

22 **C. The Provision in the Producer Application and Agreement Precluding Rebating is**  
 23 **Void as a Matter of Public Policy**

24 It is basic contract law that any provision of an agreement that violates public policy is  
 25 void as a matter of law. California Civil Code § 1667. “A public policy against enforcement of  
 26 promises or other terms may be derived by the court from: (a) legislation relevant to such a  
 27 policy...” Rest.2d, Contracts, § 179. Here, the “Producer Application and Agreement” signed by  
 28 defendant Lacape, as well as the other defendants, provided that the agents were not allowed to

1 engage in rebating. Such a restriction is against public policy.

2 As discussed in plaintiff's opposition to this motion, the purpose of Proposition 103 was  
3 to "create a more competitive and fair marketplace for insurance in California". Harvey  
4 Rosenfeld, *Auto Insurance: Crisis and Reform*, 29 U. Mem. L. Rev. 69, 100 (1998). In addition  
5 to rolling back rates, Proposition 103 also repealed California's anti-rebating statutes in an effort  
6 to foster competition among agents for the benefit of customers and to increase the affordability  
7 of insurance for consumers. *Id.* Further, despite the fact that the State legislature has since  
8 reenacted certain of the statutes repealed by Proposition 103, after determining that their repeal  
9 did not further the interests of consumers, the legislature has not reenacted any of the statutes that  
10 previously prohibited rebating life insurance premiums to consumers. *California Insurance Law*  
11 *& Practice*, Vol. 3, Matthew Bender, 2007, § 21.02[4], p. 21-7.

12 The issue then is: Can the plaintiff, by its Producer Application and Agreement, preclude  
13 its agents from doing that (i.e., rebating) which the People of the State of California expressly  
14 approved with the passage of Proposition 103 in November 1988, and which the State legislature  
15 has not seen fit to thereafter restrict, despite having numerous opportunities during the past 20  
16 years to review those sections of the Insurance Code that were repealed? The clear answer is no.

17 Rebating insurance premiums to customers is an undeniable benefit to consumers, which  
18 is why Proposition 103 expressly repealed California's anti-rebating statutes and why the  
19 legislature has not subsequently re-enacted the anti-rebating provisions with respect to life  
20 insurance. Plaintiff's attempt to prevent its agents from providing this benefit to consumers is  
21 against public policy and the provision in the Producer Application and Agreement precluding  
22 rebating is therefore void.

23 **D. California B&P Section 17200 Is Inapplicable To Life Insurance.**

24 In addition to the matters discussed above, Proposition 103 also generally provided that  
25 insurance is subject to the antitrust and unfair business practice law of the Business and  
26 Professions Code. *California Insurance Law & Practice*, Vol. 3, Matthew Bender, 2007, §  
27 21.02[4], p. 21-7. California Insurance Code § 1861.03(a) was the resulting statute. However, as  
28 discussed in plaintiff's opposition to this motion, Insurance Code §§ 1861.13 and 1851,

1 respectively, provide that many of the statutes resulting from Proposition 103, including §  
2 1861.03, are inapplicable to life insurance. Therefore, § 1861.03, which provides that insurance  
3 is subject to California's unfair competition laws, is expressly inapplicable to life insurance.  
4 *California Insurance Law & Practice, Vol. 3*, Matthew Bender, 2007, § 21.02[4], p. 21-7.  
5 Therefore, plaintiff's cause of action for violation of Business and Professions Code § 17200 is  
6 improper and must be dismissed.

## 7 II. CONCLUSION

8 The entire premise of plaintiff's complaint (i.e., that defendants engaged in some type of  
9 illegal conduct) is flawed. Despite its best efforts, plaintiff has failed to articulate any valid  
10 underlying tort or predicate act to support either a B&P § 17200 or a Civil RICO claim. Further,  
11 there has been no breach of any valid contract provisions. Therefore plaintiff's complaint should  
12 be dismissed without leave to amend.

13  
14 Dated: April 28, 2008

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